Paul Mueller Company *and* Sheet Metal Workers International Association, Local No. 208. Cases 17–CA–17623, 17–CA–17715, 17–CA–17898, 17–CA–17988, 17–CA–18153, 17–CA–18397, 17–CA–18465, 17–CA–18493, and 17–CA–18688

September 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 21, 1997, Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed exceptions, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The Respondent excepts to the judge's finding that it unlawfully delayed reinstatement for 89 unfair labor practice strikers who made an unconditional offer to return on May 22, 1996. On July 25, 1997, the Respondent also filed an alternative motion to reopen record to take additional evidence on this issue. The Respondent asserts that the General Counsel had stipulated during the hearing that the complaint made no allegation as to the timeliness of the strikers' reinstatement. In the event that its exception to the judge's finding is not sustained, the Respondent requests that the hearing record be reopened so that it can explain the circumstances as to the delay in reinstating the strikers.

On July 30, 1997, the General Counsel filed an agreement to reopen the record. The General Counsel stated that, in light of the Respondent's apparent good-faith belief that the issue of the timely return of strikers would not be litigated, he would accede to the record being reopened on this issue. Based on the General Counsel's agreement, we will grant the Respondent's motion, sever the timely reinstatement issue in Case 17–CA–18688, and remand this issue for further appropriate proceedings before the judge.

2. The judge recommended dismissal of the allegation that Plant Superintendent McGuire violated Section 8(a)(1) of the Act by threatening two former strikers with closer supervision because of their union activities. We find merit in the General Counsel's exceptions on this issue.

On May 22, 1996, the Respondent accepted an offer from the Union's president-business manager, Hulse, for about 100 strikers to return to work. Hulse himself was among those in the returning striker group. The Union had authorized these employees to return while it continued the strike with other employees. The Respondent reinstated Hulse and Roger Humphrey, among others, on May 31, 1996.

On that same day, Plant Superintendent McGuire summoned Hulse to his office and told him that if the efficiency rating for Hulse's department declined from its current high level, he would look around to see "if the returning strikers [were not] pulling a slowdown or goldbricking." Later that same day, McGuire also told Humphrey that his department had a high efficiency rating and that "they didn't want [him] to come in there and disrupt the department . . . [and] to keep up the work and not pull a slowdown." Immediately after this meeting, Supervisor McKenna told Humphrey that they were "going to keep an eye on [him] and make sure [that] I didn't slow down and disrupt the department."

The judge found McGuire's (and, implicitly, McKenna's) statements to be lawful as "a reasonable, understandable precaution against the disruption of production since most of the strikers were returning, but the strike was still continuing." We disagree.

The Board has long held that employer threats of closer supervision because of union activity violate Section 8(a)(1) of the Act. *Wellstream Corp.*, 313 NLRB 698, 704 (1994); *Jennie-O Foods*, 301 NLRB 305, 310 (1991); and *Olympic Limousine Service*, 278 NLRB 932, 936 (1986). Contrary to the judge, the strikers' exercise of their lawful right to strike did not justify singling them out for closer supervision on their return to work, whether or not a strike continues. There must be some reasonable objective basis for fearing that the returning strikers would not perform their jobs as they had in the past or would attempt to disrupt the productivity of coworkers. No such evidence exists in this case.[1]

Moreover, not only did management officials McGuire and McKenna single out two returning strikers to warn them that they would be closely supervised, but the officials strongly implied that they would be held responsible if *departmental* productivity declined, regardless of whether the former strikers engaged in unprotected conduct that fostered or contributed to that decline. See, e.g., *Armour-Dial, Inc.,* 245 NLRB 959 (1979) (unlawful to single out union committeemen for discipline beyond the scope of their individual misconduct).

[1] Lacking any evidence, our dissenting colleague and the judge would permit an employer to presume that returning strikers are more likely than their coworkers to impair productivity. We find no warrant in the Act for this discriminatory presumption.

The statements by McGuire and McKenna must also be considered in the context of other unlawful actions against returning strikers in the same time period. In fact, 2 weeks after McGuire's conversation with Hulse, he discriminated against Hulse by issuing a written warning because Hulse was keeping a log of his jobs. The logging of jobs was a common employee practice that Hulse himself had followed since 1992. We think that it is not purely coincidental that McGuire sought to interdict the maintenance of a job log that could have provided a returning striker some defense against management claims that he was engaged in a work slowdown. In addition, other returning strikers were subjected to discrimination by the Respondent's failure to reinstate them to their former jobs or by its assignment of more onerous work to them.[2]

Based on the foregoing, we find that the statements about closer surveillance would reasonably tend to restrain or coerce employees from engaging in or supporting protected union activities. These statements were therefore threats in violation of Section 8(a)(1) of the Act.

3. The judge found that in July 1995 the Respondent unilaterally transferred the bargaining unit work of assembling several stainless steel tanks (used for wine production) to another plant, without bargaining with the Union. In finding this action to be a violation of Section 8(a)(5) and (1) of the Act, the judge rejected the Respondent's reliance on a management-rights provision in the parties' expired collective-bargaining agreement. He found that the provision did not provide the required clear and unmistakable waiver of the Union's right to bargain about this subject.

In exceptions, the Respondent contests the judge's interpretation of the management-rights provision.[3] We find no need to address this issue. It is well established that "the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary." *Ironton Publications*, 321 NLRB 1048 (1996). A management-rights clause constitutes such a waiver and, as such, is ordinarily limited to the duration of the collective-bargaining agreement. *Blue Circle Cement Co.*, 319 NLRB 954 (1995); *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993); *Control Services*, 303 NLRB 481, 483–485 (1991), enfd. 961 F.2d 1568, 975 F.2d 1551 (3d Cir. 1992); and *Holiday Inn of Victorville*, 284 NLRB 916 (1987). We therefore find that the Respondent cannot rely on the management-rights provision here to justify its unilateral action after the expiration of the contract containing that provision. For this reason, we adopt the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Paul Mueller Company, Springfield, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring bargaining unit work without giving the Union advance notice and an opportunity to bargain about the transfer decision and its effects.

(b) Unilaterally paying new employees start wages rates that are higher than those offered in negotiations with the Union.

(c) Unilaterally adopting the Med-Pay Plus, PBA, or other delivery system in its health insurance plan.

(d) Unilaterally limiting increased retirement benefits to retirement plan participants on the current payroll.

(e) Unilaterally giving a retroactive wage increase to reward nonstriking employees.

(f) Threatening any unfair labor practice striker with permanent replacement if he does not abandon a strike.

(g) Promising to promote any employee for abandoning a strike.

(h) Threatening closer supervision of employees because they engaged in protected union and strike activities.

(i) Discriminating against any employee for being a union official in the plant.

(j) Failing to return unfair labor practice strikers to their former jobs after their unconditional request.

(k) Issuing onerous work assignments to returning strikers for engaging in a strike.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning wages and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time craftsmen, fabricators, and production workers employed by Paul Muel-

[2] The Respondent did not except to the judge's findings that it committed these unfair labor practices against Hulse and the other returning strikers.

[3] The Respondent does not contest the judge's finding that the work transfer involved a mandatory bargaining subject.

[4] Member Hurtgen would find the violation because the Respondent's conduct was not shown to be consistent with past practice.

ler Company at its Springfield, Missouri facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas, and other machinist work areas.

(b) Restore the assembly of wine tanks to the bargaining unit employees in the Springfield plant.

(c) Raise the start wage rate for all production workers to $7.85 an hour, retroactive to May 1, 1995, and grant the production workers backpay, with interest.

(d) On request of the Union, restore the health care delivery system in existence for bargaining unit employees prior to implementation of the Med-Pay Plus and PBA delivery system and make unit employees whole for any losses they may have suffered as a result of the plan change, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 940 (9th Cir. 1981). Reimbursement shall be made with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Rescind the amendment to the retirement plan that limited the increased benefits to retirement plan participants on the current payroll.

(f) On request, return Steward Gerald Clevenger and employees Eugene Crain, Timothy Daniels, and Luong Nguyen to their former positions before the strike.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warnings given President-Business Manager James Hulse and Secretary-Treasurer Gary Horned, and within 3 days thereafter notify them in writing that this had been done and that the warnings will not be used against them in any way.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Springfield, Missouri, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 20, 1994.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has take to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the issue in Case 17–CA–18688 pertaining to the Respondent's alleged failure to timely reinstate 89 strikers who made an unconditional offer to return to work on May 22, 1996, is remanded to the judge for reopening of the record and for further proceedings consistent with this Decision and Order.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, I do not find merit to the allegation that the Respondent violated Section 8(a)(1) by unlawfully threatening two strikers who returned to work during an ongoing labor dispute with closer supervision. Rather, I find that the challenged statements to these strikers were, as found by the judge, "reasonable understandable precaution[s] against the returning strikers disrupting production in support of the remaining strikers."

In late May 1996, striking employees James Hulse (also the Union's president-business manager) and Roger Humphrey returned to work, some 10 months after more than 200 unit employees went on strike against the Respondent. At the time of their return, more than 40 employees remained out on strike. Upon their return, Plant Superintendent McGuire informed Hulse that Hulse's department had achieved an efficiency operating rating

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of 120 percent and that, if that rating did not continue, he would look to see "if the returning strikers [were not] pulling a slowdown or goldbricking." McGuire similarly informed Humphrey that Humphrey's department's rating was at 117 percent and that "they didn't want me to come [back] in there and disrupt the department . . . to keep up the work and not pull a slowdown." Subsequently, Supervisor McKenna told Humphrey that they were "going to keep an eye on me and make sure [that] I didn't slow down and disrupt the department."

In affirming the judge, I note that Hulse and Humphrey had returned to work after a prolonged strike, during which the Respondent had continued its operations, and after which many employees remained out on strike. The Respondent was simply telling Hulse that *if* efficiency fell, the Respondent would investigate to see if the returning strikers were responsible.[1] Similarly, the Respondent warned Humphrey that it did not want him to engage in a slowdown or other disruptions. I agree with the judge that the above-cited statements were reasonable, indeed prudent, cautionary statements that did not violate the Act. Further, unlike the cases on which my colleagues rely, the Respondent's statements were directed toward the maintenance of its production levels in the midst of an ongoing strike. In my view, such statements would not reasonably tend to restrain or coerce those employees from engaging in or supporting *lawful* union activities.

Nor do I agree with my colleagues that the supervisor's statements "strongly implied that [the two employees] would be held responsible if *departmental* productivity declined." (Emphasis in original.) On the contrary, when informing Humphrey that they were "going to keep an eye on *me* and make sure [that] *I* didn't slow down and disrupt the department [emphasis added]," Supervisor McKenna was clearly addressing his individual conduct. Cf. *Armour-Dial, Inc.*, 245 NLRB 959, 960 (1979).[2]

Accordingly, I would dismiss this 8(a)(1) allegation.

[1] Contrary to my colleagues' assertion, I have not made any presumptions regarding the conduct of employees who returned to work during the ongoing labor dispute. Nor is such a presumption to be drawn from the Respondent's statements. The Respondent was simply telling the returning employees that *if* production fell, the Respondent would investigate to determine *whether* they were responsible.

[2] Unlike my colleagues, I would not bootstrap subsequent Respondent conduct in order to find unlawful these statements to Hulse and Humphrey. More particularly, my colleagues speculate that the Respondent intended to interdict log keeping in order to deprive employees of a defense against a claim of work slowdown. There is nothing to support this speculation, and the envisaged scenario never occurred.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally transfer bargaining unit work without giving the Sheet Metal Workers International Association, Local No. 208 advance notice and an opportunity to bargain about the transfer decision and its effects.

WE WILL NOT unilaterally pay new employees start wage rates that are higher than those offered in negotiations with the Union.

WE WILL NOT unilaterally adopt the Med-Pay Plus, PBA, or other delivery system in our health insurance plan.

WE WILL NOT unilaterally limit increased retirement benefits to retirement plan participants on the current payroll.

WE WILL NOT give a retroactive wage increase to reward nonstriking employees.

WE WILL NOT threaten any unfair labor practice striker with permanent replacement if he does not abandon a strike.

WE WILL NOT promise to promote any employee for abandoning a strike.

WE WILL NOT threaten closer supervision of employees because they engaged in protected union and strike activities.

WE WILL NOT discriminate against any employee for being a union official in the plant.

WE WILL NOT fail to return unfair labor practice strikers to their former jobs after their unconditional request.

WE WILL NOT issue onerous work assignments to returning strikers for engaging in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the assembly of wine tanks to our bargaining unit employees in the Springfield plant.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on wages and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time craftsmen, fabricators, and production workers employed by us at our

> Springfield, Missouri facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas, and other machinist work areas.

WE WILL raise the start wage rate for all production workers to $7.85 an hour, retroactive to May 1, 1995, and grant the production workers backpay, with interest.

WE WILL, on request of the Union, restore the health care delivery system in existence for bargaining unit employees before we implemented the Med-Pay Plus and PBA delivery system.

WE WILL make whole any bargaining unit employees who may have suffered any loss as a result of our unilateral change in health plans, with interest.

WE WILL rescind the amendment to the retirement plan that limited the increased benefits to retirement plan participants on the current payroll.

WE WILL, on request, return Steward Gerald Clevenger and employees Eugene Crain, Timothy Daniels, and Luong Nguyen, to their former positions before the strike.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warnings given President-Business Manager James Hulse and Secretary-Treasurer Gary Horned, and WE WILL, within 3 days thereafter notify them in writing that this had been done and that the warnings will not be used against them in any way.

PAUL MUELLER COMPANY

Richard C. Auslander and *Francis A. Molenda, Esqs*., for the General Counsel.

Stanley E. Craven, Esq., of Kansas City, Missouri, for the Respondent.

Patrick J. Riley, Esq., of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Springfield, Missouri, on August 19–21, 1996. The charges and amended charges were filed from September 23, 1994, through August 14, 1996, and the sixth consolidated complaint was issued August 14, 1996.

After an impasse in negotiations and implementation of its last offer on September 19, 1994, the Company unilaterally made additional changes in conditions of employment and transferred bargaining unit work to its nonunion Iowa plant without bargaining with the Union. During the strike that followed, the Company continued to determine unilaterally the employees' wages and working conditions as if the Union no longer existed in the plant.

The primary issues are whether the July 25, 1995 strike was an unfair labor practice strike and whether the Company, the Respondent, further violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures stainless steel tanks at its facility in Springfield, Missouri, where it annually ships goods valued over $50,000 directly outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Impasse and Implementation of Last Offer

On May 19, 1994, the Company and Union began bargaining for a new agreement at the Springfield, Missouri plant to succeed their 3-year collective-bargaining agreement expiring June 11, 1994 (Tr. 19, 117; GC Exh. 2). In the negotiations that followed, the Company sought changes in its self-insured health insurance program to contain the increasing costs. The only such changes discussed in the negotiations were the Company's proposal to increase the annual deductible and to increase the employees' copayment. (Tr. 20, 64–65, 70, 117, 530.)

The 1991–1994 agreement provided in article 16, "Hospitalization and Insurance Program," that "The program will provide a range of benefits equivalent to the existing program and will continue to be funded by company contributions on behalf of employees." Speaking for the Company, Personnel Director Michael Young said that the Company had experienced some $3 million in claims experience in the previous 3 years. He emphasized that all company employees, including officials and the employees in the Company's nonunion Osceola, Iowa plant, had the same coverage and that whatever was decided at the bargaining table would be implemented companywide. (Tr. 65–66, 117.)

International Organizer Michael Krasovec took the position that the Union represented only 44 percent of the employees and that he needed and was requesting the names of all the participants (including dependents) in the health insurance plan, together with the dollar amounts of their claims for each of the past 3 years (Tr. 21–22, 66–67, 115–116).

Young stated his willingness to provide this information, but insisted that the Union pay for it (Tr. 67). He stated in his July 27, 1994 letter to Krasovec, in part (GC Exh. 4):

> We have no objection whatsoever to arranging for the information to be obtained and provided to you. However, the company does not wish to expend its time, money and resources compiling this information, especially since we have advised you in negotiations that the information, when completed, is not going to cause us to change our

> position that all Mueller employees should be covered equally by the same health insurance plan.
>
> Our best estimate as to the actual cost of producing the information you have requested is in the range of $3000–$4000, and we have proposed that you should agree to pay that amount before the Company undertakes the project.

Krasovec took the position that for the Company "to ask us to consider taking a cut in something and then also ask us to pay for the information to prove that they needed to cut, in my opinion, was ludicrous." He refused to pay for the information. (Tr. 68, 119–121, 451–452.)

On September 19, 1994, after the Union rejected the Company's proposal, Young wrote Krasovec a letter, declaring a bargaining impasse and announcing implementation of its final offer (Tr. 64, 466; R. Exh. 11). The General Counsel and Union dispute a valid impasse because of the Company's refusal to provide the requested information.

On October 31, 1994, Krasovec agreed to pay for the information. Young then checked with the third-party administrator of the Company's self-insured plan to determine the actual cost of providing the information. Alan Lemley, president of Benefit Consultants, Inc., testified that in Young's initial call to him about providing the information, he gave Young an estimate of $1500. Lemley sent Young a fax, stating that "Per our conversation, we would charge our regular hourly time charges not to exceed $1500." (Tr. 69–71, 120–122, 531; GC Exh. 5.)

After Lemley prepared the information, Young changed his position and refused to provide the names of the nonunit participants because of a privacy issue. Young agreed, however, to "provide access to all of our data to a union attorney or union certified accountant operating under a confidentiality agreement" for an audit to verify the claim payments. (Tr. 27–28, 71–75, 122–123, 128–133, 454–450, 533–534; GC Exhs. 6, 7; R. Exhs. 6, 9.)

Because of the Union's refusal, before the declared September 19 impasse, to pay any part of the cost of the claims payment history, I find that the Company's refusal to provide the information before that date did not preclude a valid impasse.

Regarding the Company's change of position after the Union agreed to pay the $1500 cost of compiling the information, I find that the Company's offer to permit an audit by a union attorney or certified accountant would provide the necessary verification that the claim payments were actually made, without infringing on the privacy of the nonunit participants.

Accordingly I find that the Company did not commit the alleged violation of Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with a listing of all company employees and their dependents and the individual costs for the Company's providing health care for each employee and dependent for each of the past 3 years.

I find that there was a valid impasse in bargaining on September 19, 1994.

B. Unfair Labor Practice Strike

1. Bargaining obligation after impasse

It is well established that the fact of an impasse enables the employer to make unilateral changes in working conditions that are "not substantially different or greater than any which the employer . . . proposed during the negotiations." *Atlas Tack Corp*., 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1997). As recently held in *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997), "When impasse occurs, an employer may implement only those changes reasonably falling within its pre-impasse proposal."

It is also well established that when an impasse in bargaining is reached, the duty to bargain is not terminated, but only suspended. The Supreme Court observed in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982):

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." . . . Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." . . . Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

The impasse doctrine is not a device to allow any party to continue to act unilaterally and to ignore the collective-bargaining process in determining the conditions of employment. Yet here, the Company was doing both.

2. Making unilateral changes after impasse

After declaring an impasse on September 19, 1994, the Company first made a unilateral change—not proposed in negotiations—in the retirement plan on October 20, 1994, as found below. Next, the Company refused the Union's November 18 request (GC Exh. 6) for "immediate resumption of negotiations." Young responded on November 22 (GC Exh. 7):

> In response to your letter of November 18, 1994, there appears to be no reason to meet for further negotiations. You have our final offer. Unless and until we have some indication that the Union is ready to accept the offer *in all substantial respects*, further negotiations would be a waste of time. [Emphasis added.]

The first negotiating session after the September 19, 1994 impasse was held 5 months later on February 15, 1995. By this time the Regional Director on December 30, 1994, had issued the first refusal-to-bargain complaint (GC Exh. 1E) and Personnel Director Young had given International Organizer Krasovec a letter on February 2, 1995 (GC Exh. 8), stating

> We have arranged for the following benefit improvements to the Group Medical Insurance Program covering all Paul Mueller employees: [listing five improvements].
>
> We assume you will have no objections to these improvements which we intend to implement and announce to employees as soon as the arrangements are finalized.
>
> Let me know if you do object to any of these improvements by Monday, February 6, 1995.

On February 3, 1995, Krasovec hand-delivered to Young a critical letter (GC Exh. 9), protesting the unilateral action and stating: "I feel if you had shown a little more generosity like this when we were at the table, instead of your take it or leave

it, 'screw you we'll do whatever we want' attitude, we may just have a new contract by now."

In the February 15 session, as indicated in the Company's notes of the meeting (GC Exh. 45, p. 1), Young acknowledged that the "NLRB has issued a complaint," but added that "nothing is illegal until a court so decides. We may not have that answered for 2–3 years." The notes also attribute to Young the following statements:

> Company felt it would be a good idea to meet since it's been quite some time since our last meeting.
>
> We are not here to draw a line between us—but we are here to listen to you and try and reach an agreement. Please understand our last offer is *still open for your acceptance*. [Emphasis added.]

The notes indicate (p. 2) that Young referred to his February 2 letter "regarding some group insurance benefit improvements we plan to make" and to Krasovec's February 3 letter objecting to the changes. Young asked, "Can we discuss it?" and "are you willing to negotiate?" Krasovec answered, "I'll discuss the changes with you. I have objections to any unilateral changes until we reach an agreement or are declared at impasse."

The notes further indicate that they began discussing the five offered improvements and that Young stated "we plan to implement them effective March 22 unless the Union could agree to bypass the 30-day provision in our implemented offer." He stated that "This is a good example of the advantage in retaining flexibility to change the plan" (discussed below).

Thus, Young offered to negotiate, giving the Union another chance to accept the Company's last offer, and discussed the offered benefit improvements. Young made no mention, however, of the Company's decision to announce 2 days later, at employee meetings in the plant, a different delivery system for providing the group health benefits (Tr. 78–79, 584). Young admits that none of the five improvements related to the new delivery system (Tr. 514).

This delivery system consisted of a preferred provider organization, Med-Pay Plus, for physician and hospital benefits and Pharmacy Business Associates, the PBA managed prescription drug plan, for prescriptions (GC Exhs. 11, 12). Completely ignoring the Union as the bargaining representative of the unit employees, the Company unilaterally instituted these two plans without discussing them with the Union (Tr. 78–79, 584).

Meanwhile, as discussed below, the Company made other unilateral changes without affording the Union an opportunity to bargain.

3. Unilateral changes before the strike

a. Amendment to retirement plan

In the pre-impasse negotiations, the Company offered to increase the accrued retirement benefits and Personnel Director Young stated that the proposal covered all participants in the retirement plan. On October 20, 1994 (a month after the Company implemented its proposal), however, the Company unilaterally amended the retirement plan to limit the increased benefits to retirement plan participants on the current payroll.

The expired 1991–1994 agreement had provided, in article 15 (GC Exh. 2, p. 10), graduated monthly retirement benefits of $12 for years of credited service before 1981, $14 until 1984, and $20 after 1984.

The Company's August 10, 1994 "modified last and final offer" (GC Exh. 3 p. 1) stated "we have agreed to make the following modifications [to our initial final offer]," including:

> (2) Retirement benefits increased to $21 per year for *all* [emphasis in original] years of credited service up to 35 years maximum (Page 23).
>
> . . . .
>
> A copy of the *proposed new contract* [emphasis added] is attached.

The attached "proposed new contract" provided (GC Exh. 3 p. 23):

> The *accrued pension formula* shall be twenty-one dollars ($21) times an employee's years of credited service, provided that no more than 35 years of credited service shall be used. [Emphasis added.]

Neither wording of the proposal restricted the coverage to current employees.

When this provision was discussed in the pre-impasse negotiations on August 9, 1994, as International Organizer Krasovec credibly testified, he asked Personnel Director Young: "Does it cover everybody in the plan?" Young answered, "Yes, it does." (Tr. 79–80.)

Krasovec specifically remembered his question because earlier in a union caucus a member of the union negotiating committee, Al Crossland, had asked, "Does this include me?" Crossland, having accrued retirement benefits as a company employee before becoming a business agent (Tr. 470), was still a participant in the plan. The specific point of Krasovec's question to Young, "Does it cover everybody in the plan?" was to determine whether the provision covered all participants. (Tr. 80–83.) By his demeanor on the stand, Krasovec impressed me most favorably as a truthful witness, with a good memory of what happened.

Upon claiming in an answer on cross-examination that Krasovec was asking about "current" employees, Young added in the same answer: "Mr. Crossland, when the name came up was not a current employee." (Tr. 506.) Thus, although Young claimed that Krasovec was asking only about current employees, his testimony reveals his knowledge that Krasovec was asking the question specifically in reference to Crossland's retirement benefits. By his demeanor on the stand, Young appeared to be less than candid.

The Company's notes of the August 9, 1994 bargaining session (Tr. 521) do not indicate that Krasovec asked only about "current" employees being covered, rather than all current (not retired) participants in the plan. The notes (which are *not* contended to be verbatim) instead indicate that Krasovec asked: "Under the retirement program, that $21 proposal covered all [company] *employees currently entitled to that plan* [emphasis added]."

Having credited Krasovec's testimony that he asked if the Company's offer covered "everybody in the plan" and Young answered, "Yes, it does," I find that it was clear to both Young and Krasovec at the time that Young was confirming that all

plan participants were covered, whether or not on the current payroll.

Evidently being unwilling to adhere to the wording of the Company's own "proposed new contract," the Company on October 20, 1994, unilaterally—without notice to the Union—adopted amendment no. 1, which specifically limited the coverage of the increased retirement benefits to current and future employees. The amendment provided (GC Exh. 46, p. 2) that

> (a) If a Participant was an *Active Participant on September 19, 1994* [emphasis added], or first became an Active Participant after that date, his monthly Accrued Benefit as of any date will be an amount equal to $21.00 multiplied by his Accrued Service (not to exceed 35 years) on such date.
>
> (b) If a Participant was not an Active Participant on September 19, 1994 [he would be entitled to the previous graduated $12, $14, and $20 accrued benefits].

On February 16, 1995, Krasovec requested an update on the operation of the retirement plan (GC Exh. 13). Upon receiving a copy of amendment no. 1, he complained to Young (Tr. 82–83):

> I pointed out the Board of Trustees had adopted something different than what was in their last and final offer to the Union, that [the amendment] still contained the graduated pension benefits, and that's not what we were told at the bargaining table, and that's not what I presented to those people in the meeting when it was asked at a union meeting.

Although the October 20, 1994 minutes of the board of trustees (GC Exh. 46) show that Young was present at the meeting in which amendment no. 1 was adopted, it is undenied (as Krasovec credibly testified) that Young first "told me he didn't have any idea" what the amendment was. After Krasovec then pointed out that the graduated benefits were still in the plan the trustees adopted, Young's response was: "We did it." (Tr. 82–83.)

I find that the Company's unilateral amendment to the retirement plan on October 20, 1994 was "substantially different" from the Company's pre-impasse proposal.

I therefore find that the Company's adoption of the unilateral change in the retirement plan after the impasse violated Section 8(a)(5) and (1) of the Act.

b. Change in health care plan providers

The Company *admits* in its answer (GC Exh. 1HHH) the allegation in the complaint (GC Exh. 1FFF ¶ 9d) that about February 17, 1995, it failed to continue in effect the preexisting conditions of employment "by announcing and instituting new . . . conditions of employment . . . including changes in the health insurance plan, instituting a preferred provider organization called Med-Pay Plus, and changing to a new prescription drug cover plan called Pharmacy Business Associates."

Although this unilateral action is not defended in its brief, the Company evidently would contend that it lawfully reserved the right to make such changes by including the following provision in its pre-impasse proposal, in article 16, "Group Medical and Life Insurance Program" (GC Exh. 3 p. 23), implemented on September 19, 1994 (R. Exh. 11):

> Major benefit changes will be discussed with the Union at least thirty (30) calendar days prior to becoming effective.

Under this provision the Company on December 19, 1994, had raised, effective January 1, 1995, the health-insurance deductible from $100 to $200 and the copayment from 10 percent of the first $1000, to 20 percent of the first $2500. This increased the employees' annual out-of-pocket limit from $200 to $700. (Tr. 467; R. Exh. 12.)

As discussed above, the Company's notes of the February 15, 1995 negotiating session indicate that Young was relying on this "Major benefit changes" provision in the implemented pre-impasse proposal when discussing the five benefit improvements he announced in his February 2, 1995 letter to Krasovec. He stated that the Company planned to implement the improvements plan on March 22 "unless the Union could agree to bypass the 30-day provision in our implemented offer" and that "This is a good example of the advantage in retaining flexibility to change the plan" (GC Exh. 45, p. 2).

Although both the January 1, 1995 benefit changes increasing the deductible and copayment and the five benefit improvements would be included in the description, "Major benefit changes," I find that instituting an "entirely new delivery system," as held in *Loral Defense Systems-Akron*, 320 NLRB 755, 756 (1996), was not "reasonably comprehended" in the implemented proposal, reserving the Company's discretion to make changes in benefits.

As found, the only health plan changes discussed in the pre-impasse negotiations were the Company's proposal to increase the annual deductible and to increase the employees' copayment. There was no indication that the Company intended by its proposal to reserve the discretion not only to make benefit changes in its self-insured group health plan, but also to change plan providers.

Moreover, even if Company had retained the discretion to change plan providers after discussion with the Union at least 30 days before, it failed even to discuss the new delivery system with the Union before implementing the change (Tr. 78–79, 584).

As found, Young on February 15, 1995, made no mention of the Company's decision to announce the Med-Pay Plus preferred provider plan (with a Med-Pay Plus Network Physician List of 460 physicians, GC Exh. 11) and the PBA managed prescription drug plan (GC Exh. 12) in employee meetings 2 days later on February 17 (GC Exh. 10).

The only possible reference in the Company's notes of the February 15 session (GC Exh. 45, p. 2) to the February 17 employee meetings would be the following question by Krasovec and answer by Young (appearing in the notes after their discussion of the five benefit improvements offered by the Company in Young's February 2 letter to Krasovec):

> I understand there is somebody coming from Principal to discuss these insurance changes. I want to be present. As their official union representative, I'm asking for you to consider letting me set in.

I'll consider it. I'll let you know tomorrow.

Young admitted that he later refused, telling Krasovec "we didn't feel he needed to be a part" of it (Tr. 32–33).

Young claimed on direct examination that the Med-Pay Plus and PBA plans "were discussed in negotiations with the Union" in the February 15 bargaining session (Tr. 473–474). On cross-examination, when shown a copy of the Company's notes of the February 15 session, Young admitted, "I don't see anywhere [that] we specifically said Med-Pay Plus or PBA." His only explanation for there being no mention in the notes of any such discussion was: "Well, as I said, these, all of our minutes are just a summary." (Tr. 501.)

When Krasovec was recalled as a rebuttal witness and asked if Med-Pay Plus was discussed at the February 15, 1997 negotiating session, he positively and credibly testified, "No, sir, absolutely not" (Tr. 584). I discredit, as a fabrication, Young's claim to the contrary.

I find that instituting the Med-Pay Plus and PBA delivery system in the health insurance plan, as announced to the employees on February 17, 1995, was not "reasonably comprehended" within the Company's implemented pre-impasse proposal.

I therefore find that by unilaterally instituting the "entirely new delivery system" in the insurance plan after the impasse, the Company engaged in an unlawful refusal to bargain in violation of Section 8(a)(5) and (1).

c. Increase in new employee wages

About May 1, 1995 (after the September 19, 1994 impasse in bargaining and nearly 3 months *before* the July 25, 1995 strike)—without notice to or bargaining with the Union—the Company raised the start wage rates of some recent and newly hired production workers above the start rates in the Company's implemented pre-impasse proposal to the Union.

The start rates in the Company's pre-impasse proposal (GC Exh. 3, p. 5) were $6.50 an hour for production worker (with periodic raises to $6.80 in 12 months, $7.30 in 24 months, and a top rate of $7.85 in 36 months), $8.20 for fabricator (raised to $8.70, $9.50, and $10.85 top rate), and $11.70 for craftsman (raised to $12.20, $12.70, and $14.10 top rate). The night-shift differential was 50 cents (Tr. 39).

On May 4, 1995, when Krasovec was meeting with employees scheduled to give pretrial affidavits (as he credibly testified) (Tr. 84):

> [T]hey were livid because they had found out through the company grapevine that employees, new hired employees, virtually new employees had received as much as $1.30 an hour increase across the board.
>
> Q. Was that putting these new people higher than the existing bargaining unit employees?
>
> A. In some cases, [the] new hires that had been there a very short amount of time were receiving the same wages as people that'd been there three or four years or longer.

Krasovec immediately called Young to protest the unilateral action and asked for a meeting to talk about it. Later in a meeting Young told Krasovec in effect that the Company "felt like they had to do it to keep or attract employees." Krasovec objected that the Company "ought to give an equal raise to everybody or bargain for the amounts of the raises." (Tr. 84–86.) Young testified that he did not recall exactly what he told Krasovec, but "I told him we may have given wage increases" (Tr. 37).

In response to a subpoena, Young produced a list of 78 employees hired after the impasse, from September 19, 1994, through May 8, 1996, showing the dates of hire and wages (Tr. 37–38; GC Exh. 14). Without explanation, the Company omitted the start wage rates of all except three employees hired before the July 25, 1995 strike, although including the start rates of 37 of the employees hired after the strike.

The three employees were production workers Michael Cox (hired 7/11/95), Shadrack Cummings (hired 7/6/95), and Frank Whitaker (hired 5/19/95). Their rates were $1.35 an hour higher than the start rates in the Company's implemented pre-impasse proposal. Cummings and Whitaker were paid the 36-month top rate of $7.85 instead of the $6.50 start rate in the pre-impasse proposal, and Cox was paid the top $8.35 night rate. (GC Exh. 3, p. 5, 14.)

The list also shows that on May 1, 1995 (4 days before Krasovec learned that the Company was unilaterally granting wage increases to new employees), the Company gave the same $1.35 an hour increase to five other employees already on the payroll. They were production workers Perrie Campbell (hired 3/15/95), Leah Cooper (hired 10/17/94), Stacy Dickison (10/17/94), David Gibson (hired 2/23/95), and Richard Steimel (hired 2/7/95). The Company also on July 24, 1995 (a day before the strike) unilaterally raised production worker David Findley (hired 5/11/95) to the top $8.35 night rate. (GC Exh. 3, p. 5, 14.)

Thus the evidence shows that—without bargaining with the Union—the Company between May 1 and July 25, 1995 paid nine new and recently hired production workers the top rate, which was $1.35 higher than the start rate, even though employees hired before the impasse were being required to work 36 months to receive the top rate.

The Company concealed the start rate of 11 other production workers, 10 fabricators, and 4 craftsmen, who were hired after the September 19, 1994 impasse and before the July 25, 1995 strike, by omitting their start rates from the list of new employees (GC Exh. 3, p. 5, 14). The evidence does not reveal if any of these 25 other new employees were paid starting rates higher than those in the Company's pre-impasse proposal.

When called as a defense witness, Young testified on direct examination (Tr. 477):

> Q. [By Mr. Craven] Now, at any time since the negotiations began for this contract, has any employee ever received more than the contractual *maximum* [emphasis added] rate proposed to the union in negotiations?
>
> A. Absolutely not.

This testimony, of course, is misleading. The Company's prepared documents (GC Exhs. 3 p. 5, 14) show that the Company was paying certain employees more than the proposed *start* rate—not more than the proposed "maximum" (36-month top) rate to which the company counsel referred in his question.

Relying on Young's misleading testimony and ignoring the company-prepared documents in evidence, the Company contends in its brief (at 9):

> In no instance . . . was any employee moved to a rate higher than the amount offered to the Union in negotiations (Tr. 477).

This contention in the brief is obviously incorrect. The documentary evidence shows that certain employees were "moved to a higher [*start*] rate than the amount offered to the Union in negotiations." I reject the contention as erroneous.

The Union contends in its brief (at 10) that "the wage increase had a discriminatory effect" because "senior bargaining unit employees did not receive the wage increase and were much more likely to be actively involved in or at least sympathetic to the Union than brand new employees."

There is obviously merit in the Union's contention.

Finding that the start wage rate in its implemented preimpasse proposal was too low to attract and keep new employees, the Company proceeded to ignore the employees' collective-bargaining representative. Instead of negotiating to remedy the low-wage problem, the Company granted a wage increase to some employees hired after the impasse, beyond what it was willing to offer in negotiations with the Union.

Not only was the Company refusing to bargain in good faith regarding wages, it was accomplishing two apparent discriminatory goals. First, as the Union suggests, it was showing favoritism toward new employees, who had not been supporting the Union over the years.

Second, as the General Counsel contends in his brief (at 28), the Company acted unilaterally in making the changes after impasse, "as though the Union did not exist." This was clearly intended to undercut support for the Union, making a possible strike (R. Exhs. 13–16) less likely to succeed.

I find that paying the 36-month top rate to new and recently hired employees after the September 19, 1994 impasse and before the July 25, 1995 strike was a unilateral change in working conditions, a wage increase that was substantially greater than any that the Company proposed during the negotiations.

I therefore find that the unilateral change in the production-worker start wage rate violated Section 8(a)(5) and (1).

d. Transfer of work to nonunion plant

Finally in July 1995, after repeatedly making unilateral changes in employee working conditions without notice to or bargaining with the Union, the Company took actions evidently designed to, and successfully did, provoke a strike—being the "last straw," as the Union contends in its brief (at 15).

In July it began transferring to its nonunion Iowa plant for assembly some wine tanks, which for years had been manufactured by union employees in the Springfield plant (Tr. 330–331, 335–338, 575–578). As Krasovec credibly testified (Tr. 87):

> I received word they were sending equipment, the welding machines, some specific machinery that was amenable only to wine tank manufacturing, component parts, and material for wine tanks, and I believe even some just newly started wine tanks, [packing and shipping employees] were told to pack them up and send them to Iowa.
>
> . . . .
>
> A. [In a meeting shortly after that] I asked [Young] what was the deal about the wine tanks going to Iowa.
>
> Q. What did Mr. Young say?
>
> A. He didn't know anything about it.

On Monday, July 24, 1995 (the day before the strike began), Krasovec wrote Young in part (GC Exh. 24):

> This is to follow up on my voice mail message to you on Friday, July 21, 1995. In our negotiating session Thursday, July 20, 1995, concerning the employee pension plan, I inquired of you concerning the rumor of equipment being shipped and orders being rerouted to Osceola, Iowa for manufacture. At that time you disavowed any knowledge, but said you would get back with me the following day if it was true, that I was filing a formal complaint and protesting those actions. I subsequently left a message for you to please call or leave a voice mail message verifying if this was true or not. I also attempted to "flag" you down as you were leaving for lunch on Friday, to no avail. Since that time, I have been informed by people in the plant that it is in fact true. The Paul Mueller Company is rerouting some 9 wine tanks, historically manufactured at this facility, resistant welding machines, spot welders, rolls and other equipment which have been used at this facility for years to Osceola for manufacture of these tanks. I also understand that at least two supervisors, along with some instructors have been reassigned from our facility to Osceola to train the personnel there.
>
> At this time, I demand immediate negotiations over the transfer of this work and equipment, as this will drastically alter the work in our facility.
>
> Since I did not hear from you by the end of business Friday, as I stipulated Thursday, I have no reason to restrain from filing further Unfair Labor Practice charges.

The only time in the past when wine tanks were transferred to Iowa for assembly was in 1988, when the Company had a previous strike at the Springfield plant and sent a single order there, at a financial loss to the Company (Tr. 151, 417, 489–490, 560, 564, 574–575; R. Exh. 20).

The Company offers no defense for failing to notify the Union before transferring the regular bargaining unit work to the nonunion plant. Neither does it make any contention that there was any urgency that prevented it from negotiating with the Union before depriving the employees of this work.

The Company does contend in its brief (at 7–8):

> Prior to the strike, the Springfield plant was operating at full capacity yet could not fulfill required production needs. At the same time, the Company's Osceola, Iowa facility needed work as it had *45 employees on layoff*. [Emphasis added.]

This contention is not persuasive. In the first place, the record does not support the Company's representation that there were "45 employees on layoff" at the Iowa plant. In fact, the Company's own witness, Operations Manager Duane Shaw, admitted at the trial: "In the middle of 1995 we did not have a

formal layoff. I believe at that point we began posting notices for voluntary layoff" (Tr. 543–544 and 548).

This contention in the brief that there were 45 laid-off employees at the Iowa plant before the July 25, 1995 strike at the Springfield plant is obviously contrary to Shaw's admission. I reject this contention also as erroneous.

The Company introduced two documents in evidence (R. Exh. 21; Tr. 544–545 and 549–550) purporting to show the extent of excessive capacity at the Iowa plant resulting from a drop in the market for the plant's principal product, milk coolers (which have been manufactured at both the Springfield and Iowa plants, depending on the workload) (Tr. 331–334, 547–549, 557, 560).

The two documents are graphs entitled "Iowa Load" as of July 12 and August 14, 1995. They purport to show the "capacity" of the Iowa plant and indicate a work force of 77 employees in July 1995.

Both graphs, however, show on their face that the projected capacity is based on an inexplicable *expansion* of the work force from 77 in July 1995 to 91 in August 1995 and thereafter—despite the drop in the milk-cooler market. ("Capacity" is defined on the graphs as follows: "Capacity based on 95 people for Apr-May, 81 [in] June, 77 [in] July, and 91 [in] Aug on out, 100% efficiency, 90% load factor.") Such a distortion of the size of the work force during and after August 1995 would obviously inflate the purported unused capacity.

After explaining these documents, Shaw claimed: "We had quite a number of people in December [1995] and January [1996] on voluntary layoff. I do not know, do not recall the exact number, but I believe it was approximately 40 percent of the work force, and that's a rough estimation." (Tr. 544–545, 549–551.)

Although the two graphs and another document relating to the Iowa plant (R. Exh. 21) were forecasts, the Company prepared a further exhibit (Tr. 563; R. Exh. 23) that shows the actual annual work hours at the Iowa and Springfield plants. This exhibit appears to belie Shaw's rough estimate of a 40-percent voluntary layoff in December 1995 and January 1996 at the Iowa plant.

The exhibit (R. Exh. 23) shows that in 1995, the monthly average work hours at the Iowa plant (112,915.6 annual hours divided by 12) was 9410 hours which, with one exception (10,518 hours in 1994), was higher than the average monthly work hours in any of the previous years at that plant. The next two highest previous monthly averages were 8885 hours in 1990 and 8392 hours in 1993. If the hours of work on the wine tanks in 1995 are excluded (112,915.6 minus 3189), the remaining monthly average in 1995 (9144 hours) would be 11.2 percent higher than the 1990 monthly average and 17.7 percent higher than the 1993 monthly average.

In 1996, instead of the hours going down with a 40-percent voluntary layoff, the average monthly hours for the first 7 months of the year (before the trial) grew from 9410 hours in 1995 to 10,733 hours (an *increase* of 14 percent). If the wine tank hours are excluded in the 1995 and 1996 figures, the monthly average in 1996 would have been an *increase* of 8 percent over the 1995 average.

Thus, contrary to the purported great loss of work at the Iowa plant, employment there in 1995 and the first 7 months in 1996 was next to the highest of any year since the plant opened in 1987 (Tr. 332–333, 560).

In the second place, there is no persuasive evidence that "the Springfield plant was operating at full capacity yet could not fulfill required production needs." The Company cites no evidence in its brief to support this contention.

It is obvious that Shaw—the only witness called by the Company to support this contention—misconstrued the graph on which the Company evidently relies. The graph (without supporting documentation) is entitled "Tank Shop Load" (R. Exh. 22). It purports to represent the total sales (somehow measured in hours) for the weeks of July 21, 1995, through January 12, 1996, and to forecast additional sales from October 6 to January 12, 1996.

The graph indicates that "Total Sold" during the week of July 21 and the first 6 weeks of the strike (July 28 through September 1, 1995) exceeded the tank shop capacity. To the contrary, Shaw claimed that the graph shows "work scheduled"—not total sales. He testified that work scheduled for the week of July 21 was about 8100 hours, that the capacity of the tank shop is about 4800 hours a week, "so we had more work than we had people to do the work as of July 21st" (Tr. 551).

I find that both the preparation of the graph and Shaw's interpretation of it were designed to deceive.

Even if sales could be figured in hours, there is nothing on the graph to indicate that those hours were scheduled to be performed that week. The graph states instead, "Total Sold." Moreover, the "capacity" line on the graph does not represent the capacity of the tank shop in the ordinary sense of the word. It purports to be based on "148 people, 93% capacity, 80% load factor."

Defined this way, the capacity of the tank shop is shown to be the same for the first 6 weeks of the strike (as if none of the tank shop employees joined the strike, leaving a vacancy). The graph shows that the tank-shop capacity dropped about 1000 hours on Labor Day week, about 2000 hours on Thanksgiving week, and about 3000 hours on Christmas week.

When construing the graph, Shaw first testified that the capacity line "shows this is the number of people we have, the available capacity" (Tr. 552). When asked "How can you put out more work than you have capacity for?" he claimed "that's the challenge . . . we, of course worked some overtime which would give us some additional capacity" (Tr. 553). Thus he was then using the word "capacity" in the sense of available employees.

Later on the stand, Shaw changed his testimony and used the word in a different sense. When admitting that employees in "perhaps five different departments had the ability" to do the tank-shop work and "We have many highly skilled employees . . . in other areas of the company [that] could be transferred and regularly are transferred to help with overload situations," Shaw used "capacity" in the sense of available space or equipment. He claimed, "We didn't have any available capacity. We . . . had more work than we could build in the tank shop in general." (581–583.) He did not dispute that the Company had lowered the amount of available equipment in the tank shop by

sending wine-tank manufacturing equipment to the nonunion plant. When testifying, Shaw appeared willing to fabricate anything that might help the Company's cause.

I reject, as not supported by credible evidence or documentation, the Company's defense that before the strike, the Springfield plant "was operating at full capacity yet could not fulfill required production needs." I reject, as a falsification, the Company's further defense that its nonunion plant in Iowa "had 45 employees on layoff" before the July 25, 1995 strike.

I also find that even if these defenses were accepted, they would not constitute justification for changing the working conditions at the Springfield plant—transferring regular bargaining unit work after the impasse in bargaining—without notice to or bargaining with the Union. The change in working conditions was a mandatory subject of bargaining and, as discussed, the Company has not contended that there was any urgency that prevented it from negotiating with the Union before removing this bargaining unit work.

I further reject the Company's contention that the "Management Prerogatives" clause in the expired contract provides a defense for its transfer of the wine tanks. As held in *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997), it is well established that "the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable" and that "generally worded management-rights clauses" will not be construed as waivers of statutory bargaining rights."

The clause provides (GC Exh. 2, art. 2, p. 1) that "The Company shall retain all of the rights and functions of Management . . . including . . . the right to manage the Company's operations and . . . determine the work to be subcontracted, or done by employees . . . to open, operate or maintain other production facilities . . . to determine the operations or services to be performed by employees at the Company's Springfield, Missouri facilities." It did not include the right to transfer bargaining unit work to another plant.

I therefore find that by unilaterally transferring the wine tanks to its nonunion Iowa plant after the impasse in bargaining and before the July 25, 1995 strike, the Company engaged in an unlawful refusal to bargain in violation of Section 8(a)(5) and (1).

4. Cause of strike

On the weekend after Young on July 20, 1995, disclaimed any knowledge of the transfer of wine tanks to the nonunion Iowa plant and on Friday, July 21, reneged on his promise to "get back with" Krasovec "if it was true," over 200 union members met and discussed the situation (Tr. 91).

Concerning the transfer of wine tanks, employees asked at the meeting "a lot of questions" about the Company's "shipping their work outside of the plant in Springfield, Missouri where it historically had been done" and expressed fear "they were going to ship everything out." They complained about the Med-Pay Plus health care plan the Company had adopted, stating that they "were having a horrendous time getting their benefits paid" and were upset that they "couldn't go to their own doctors, couldn't go to their own hospitals." Among other complaints, employees "were very upset about the [wage] increases to the new hires." (Tr. 91–92, 95.)

Krasovec told the members that "we had done everything . . . we could do through using the National Labor Relations Board to cease these unfair labor practices" and the "only recourse I saw at that time was that we may have to strike" (Tr. 92). President-Business Manager James Hulse stated that the Company "was committing unfair labor practices and we didn't have any alternative but maybe to pursue a strike." The union membership authorized the calling of a strike. (Tr. 218, 280.)

On Monday, July 24, 1995, Krasovec gave Young a letter complaining of the alleged unfair labor practices and advised that "if these situations are not rectified by 12:01 a.m., July 25, 1995, you will leave us no other choice but to begin an Unfair Labor Practice Strike shortly thereafter" (GC Exh. 25). The Union then went on strike. The strike signs read "Unfair Labor Practice." (Tr. 218.)

The evidence is clear that the unfair labor practices about which the employees complained at the strike-authorization meeting were a major cause of the strike that began July 25, 1995 (Tr. 92).

I therefore find that the strike was an unfair labor practice strike.

C. Conduct During the Strike

1. Contract offer

During the strike, which was continuing at the time of trial in August 1996 (Tr. 151, 259), the Company did nothing to remedy the immediate precipitating cause of the unfair labor practice strike: namely, its unilateral transfer of bargaining unit work to its nonunion Iowa plant.

On October 11, 1995, the Company made a written offer for a 5-year agreement. The offer would freeze for that 5-year period the production-worker start wage rates *below* the $7.85 36-month top rate in the implemented pre-impasse proposal, being paid some new employees hired after the September 19, 1994 impasse and before the July 25, 1995 strike (GC Exh. 3, pp. 5, 14).

The offer (GC Exh. 18, p. 3), setting out the "classifications and rates of pay [that] shall be in effect during the term of this Agreement," provided that the start wage rate for production worker would be $6.80 in the 1st year, $7 in the 2d year, $7.20 in the 3d year, $7.35 in the 4th year, and $7.50 in the 5th year. These start rates were all below the $7.85 rate already being paid.

As found, the Company had granted that top wage as the start rate to some production workers hired after the impasse because the $6.50 start rate in the implemented pre-impasse proposal was too low to attract and keep new employees. The Company never offered $7.85 as the start wage rate to the Union.

The contract offer further set out the periodic raises to be given employees in each of the three classifications for each of the 5 years. For the first year, the craftsman start rate was $12.05 an hour (raised to $12.60 in 6 months, $13.10 in 12 months, $13.80 in 18 months, and $14.50 in 24 months). The fabricator start rate was $8.45 (raised to $8.95, $9.50, $10.50, and $11.15 top rate). The production worker start rate, as indi-

cated, was $6.80 (raised to $7.10, $7.65, $7.75, and $8.10 top rate).

As part of the Company's October 11, 1995 offer to settle the strike (GC Exh. 18, p. 2), the Company also offered to give the employees the option to return to the previous health care delivery system, permitting them again to go to their own doctors and their own hospitals, or to remain with "the company designated managed care organization (currently Med-Pay Plus)," with a lower deductible and copayment. This offer would require the Union to agree that Med-Pay Plus was the Company's "currently" designated health care delivery system, implying that the Company was reserving the discretion to change the delivery system at will.

A third part of the Company's October 11, 1995 settlement offer (GC Exh. 18, p. 3) would raise the accrued pension formula from $21 to $25 a year—without restoring the coverage to all participants in the plan.

The Union rejected this settlement offer.

2. Retroactive wage increases and other changes

On February 20, 1996 (as discussed below) the Company, through a welding technician acting as its agent (as discussed below), revealed to a striking employee that the Company had decided not "to negotiate anymore until these unfair labor practice[s are] settled . . . that could be two or five years on appeals . . . and that they were going to pay 40 or 50 cents backpay an hour from September 19, 1995, up until the present day."

A month later, the Company proceeded to carry out such a plan.

On March 19, 1996, the Company notified the Union by letter (GC Exh. 16) that effective April 1, 1996, it "*intends to implement*" the wage increases in its October 11, 1995 offer, as well as the pension benefit improvements and additional health insurance options.

The letter further stated (as the Company had previously planned and revealed to the striker through its employee agent): "Additionally, a retroactive wage adjustment will be paid to employees who worked from September 19, 1995 [the 1-year anniversary of the September 19, 1994 implementation its preimpasse proposal] to April 1, 1996 (including those who worked during that period but who subsequently joined the strike)."

Thus, the Company was announcing its unilateral decision to make the changes in conditions of employment as a fait accompli, an accomplished fact. On March 27, 1996, it met with the Union about 20 minutes and made it clear that its decision was irreversible. It "explained what they were going to do," asking only if the Union "was going to reconsider" the October 11 offer or "had any questions." (Tr. 93, 284.).

On March 28, 1996, the Company sent a letter to the employees (GC Exh. 18), reporting that "Yesterday we met with the Union to discuss *management's intention to implement* [emphasis added] the first year wage increases, pension benefit improvement and the health insurance option" in its October 11, 1995 offer and that the "Union did not raise any objections."

The announced wage increases, which were implemented effective March 25, 1996 (as revealed by a company-prepared exhibit, GC Exh. 14), did nothing to remedy the Company's unilateral conduct in paying a higher start wage rate (never offered to the Union) to production workers hired after the September 19, 1994 impasse and before the July 25, 1995 strike.

The exhibit (GC Exh. 14) further reveals that in implementing these March 25, 1996 wage increases, the Company continued to favor new employees hired after the impasse and before the strike, as shown by the following examples.

Production worker Frank Whitaker was paid the old (preimpasse proposal) 36-month top rate of $7.85 when he was hired May 19, 1995 (2 months before the July 25, 1995 strike). On March 25, 1996, when purporting to implement its October 11, 1995 offer, the Company paid him the new 24-month top rate of $8.10 ($1 above new 6-month rate of $7.10 in the October 11, 1995 offer) (GC Exhs. 3, 14, 18).

Production worker Michael Cox was paid the old 36-month top night rate of $8.35 when he was hired on July 11, 1995. When the Company promoted him to fabricator on February 5, 1996, it paid him the old 36-month top rate of $10.85 ($2.65 above the old start rate of $8.20 for a fabricator). On March 25, 1996, it paid him the new 24-month top rate of $11.15 ($2.70 more than new start rate of $8.45 for the first 6 months as fabricator).

Craftsman Vernie Monteer (hired 5/4/95) was raised to the old 36-month top night rate of $14.60 on October 9, 1995 ($2.40 above the old start night rate of $8.20 for the first year). On March 25, 1996, the Company paid him the new 24-month top night rate of $15 ($1.90 above the new 6-month night rate $13.10).

These are not isolated examples. The company-prepared exhibit (GC Exh. 14) reveals that in implementing the new wage rates on March 25, 1996, the Company gave such favored treatment to a total of 32 production workers, fabricators, and craftsmen who were hired after the September 19, 1994 impasse and before the July 25, 1995 strike. The amounts above the rates announced to the Union and the employees, and purportedly implemented, ranged from 45 cents to $2.70 an hour.

This conduct during the strike is not specifically alleged as violative of the Act.

The Company's March 28, 1996 letter to the employees further announced that "we believe it was *only fair* [emphasis added]" to make the "wage adjustment" retroactive to all employees who remained nonstrikers for any time since September 19, 1995 (3 weeks *before* the Company's October 11, 1995 offer to the Union).

I find that this retroactive "wage adjustment," because it was "only fair," was obviously a reward for crossing the picket line. I also find that it was a demonstration to the employees that the Company intended to continue determining itself the employees' conditions of employment as if the Union no longer existed in the plant and that the retroactive pay was intended to undercut support for the Union.

This letter to the employees was dated March 28, 1996, 8 months after the strike began. Although 149 of the 208 strikers remained on strike (GC Exh. 20), the Company added:

> As we have previously informed you, we view the strike as "effectively over" and we continue to increase our capacity by hiring new employees and aggressively training and promoting. . . .
>
> We are *very optimistic about our future* in view of the excellent cooperation and team effort by our working employees. [Emphasis added.]

The Company was saying that the strike was futile and that as far as it was concerned, the Union was defeated. The Company was conveying the clear message to the employees that it was "very optimistic about our future [without any union in the plant]." An obvious purpose was to break the strike and eliminate union representation of the employees.

As found, the Company's unilateral decision to make the wage and other changes was announced as a fait accompli, and the changes were implemented without the Company remedying the unfair labor practices that were a major cause of the strike.

I therefore find, as alleged in the complaint, that by announcing and instituting the new terms and conditions of employment, comprising the changes in the wage rates, the health insurance plan, and the retirement plan, as well as the wage increase retroactive to September 19, 1995—in the absence of a bona fide impasse over the changes—the Company failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1).

I further find that this conduct, without good-faith bargaining, prolonged the unfair labor practice strike, as alleged.

3. Threats and promises

It is undisputed, as striking employee Tom Gillette credibly testified (Tr. 340–341), that welding technician Michael Teague came to his home about 7 p.m. on February 20, 1996, and said:

> [The Company was not] going to negotiate anymore until these unfair labor practice[s are] settled and . . . that could be two or five years on appeals . . . that they wanted only 50 employees back and that I should go in while the jobs are still there. . . . the first ones that went in would be on first shift, and the later ones would be on second and third shift. . . . that Jamie Claybough . . . if he came back in they would make him a master craftsman and pay him 75 cents an hour more money . . . that the replacements that they hired were permanent workers and that they were going to pay 40 to 50 cents backpay an hour from September 19, 1995 up until the present day. And if I went in, I could get in on some of that. And he told me that Mike Krasovec hadn't been telling us the truth about this unfair labor practice strike.

Although Teague is not a supervisor, I find that he was acting as the Company's apparent agent. The Company's employing him in his position of welding technician created a reasonable basis for the employees to believe that he was authorized to act on its behalf.

Teague is one of the two welding technicians in the welding/engineering department. He is responsible for about 150 of the 250 welders in the plant, as defined in the Company's position description (Tr. 347–348, 352–353; GC Exh. 40, pp. 1–2):

> "The Welding Technician is responsible for direct technical control of . . . welders and welding operators in the manufacturing operations to comply with company policy and ASME Boiler and Pressure Code. . . . Has full technical responsibility . . . for welding performance qualifications . . . . Instruct employees on the correct welding procedures on all welding and cutting equipment. . . . Administer welding test for existing and potential welders. . . . Determine if applicants are qualified for a welding classification. . . . Evaluate substandard work. Recommend and oversee the corrective action and repair.

Teague trains and tests welders and issues the certification required for an ASME welder, a higher classification (Tr. 166–167, 176, 339, 344, 350, 355–357, 362, 366–367, 373–374).

He testified that he is not a member of the bargaining unit because "I'm company employed." Although hourly paid, he does not punch a timeclock, does not wear a hard hat, and spends a large part of the time in his office. There he has a telephone, computer, and file cabinets in which he maintains "copies of everybody's welding tests they have taken" and "has information on different welding equipment" (Tr. 349, 354, 358–360.)

Teague regularly attends meetings with sales people, engineers, supervisors, and "other people in the office" (Tr. 361).

In these circumstances, I find it evident that the employees "would reasonably believe that the employee . . . was reflecting company policy and speaking and acting for management," *Pitt Ohio Express*, 322 NLRB 867 fn. 2 (1997); *Kellwood Co*., 206 NLRB 665, 672 (1973) (nonunit trainer as management spokesman). He was participating in the Company's campaign to break the strike, going to Gillette's home, making threats and promises to persuade Gillette to return to work, and revealing the Company's plans not to negotiate with the Union and to give employees crossing the picket line retroactive pay (as the Company announced a month later).

Gillette was an unfair labor practice striker, entitled to his job back if he returned to work. I find, as alleged, that the Company unlawfully (a) threatened Gillette with permanent replacement if he did not abandon the strike, (b) indicated that it would be futile for him to continue supporting the Union, and (c) promised a promotion to another striking employee to persuade the employee to abandon the strike, engaging in coercive conduct in violation of Section 8(a)(1).

4. Discrimination against union officers

a. Against Secretary-Treasurer Gary Horned

On January 30, 1996, the Company overruled the foreman's decision to give Gary Horned a verbal warning for being a few minutes late from lunch and gave him a written warning, with the threat of a possible 5-day suspension or termination as the next action to be taken. It is undisputed, as Horned credibly testified, that previously the Company had permitted Horned and other employees to make up the time at the end of the shift for being late, without any discipline (Tr. 182, 189).

Horned was secretary-treasurer of the Local and a member of the union negotiating committee. As decided by the Union, he

remained at work during the strike to serve as union steward to represent nonstriking employees. (Tr. 178–179.)

It is undisputed that Horned was told by Supervisor Wayne Horton on January 30 that he would be given a verbal warning for returning late from lunch in the Company's picnic area (Tr. 179–183, 191, 214). He was later called to the office of Plant Superintendent Kenny McGuire and given a written warning for "Failure to be in his assigned work area[, returning] from lunch approximately 7 minutes late," with the threat of "5 day Suspension or Termination" as the "Next action to be taken (if necessary)" (Tr. 185–187; GC Exh. 31.)

When Horned asked in the January 30 meeting about the verbal warning he had been told he would be getting, Horton said, "No, you got your verbal." (Tr. 186.) Horton was referring to an incident on January 4, 1996. Horned and several employees had been at a door looking for some commotion outside the plant and McGuire told Horned "you shouldn't be over there" and "he wanted me to stay in my work area." Horned said okay. McGuire then hit Horned on the shoulder, "just started laughing," and walked off. Nothing was said about a verbal warning, and there was evidently no record of a verbal warning in Horned's file. (Tr. 183–185, 192–195.) As prepared by Horton, the January 30 written warning did not show any previous counseling "in the past 12 months" (Tr. 206; GC Exh. 31).

It is undisputed that Horned protested in the meeting on January 30: "But you didn't tell me I was getting a verbal warning." McGuire responded that he did not have to tell Horned or put it on his record. Horned argued, "Wait a minute. If you don't put it on my record and you don't tell me I got a verbal warning, how in the hell am I supposed to know I got a verbal warning?" McGuire again responded, "Well, I don't have to tell you you got a verbal warning and I don't have to put it on your record." (Tr. 186.)

In the absence of any verbal warning in Horned's file, I infer that the Company's claim that Horned had been given a verbal warning earlier that month was fabricated as an afterthought, to justify the January 30 written warning.

On January 31, 1996, Horned complained in writing (GC Exh. 32) that the Company did not follow "their own corrective procedure" by not giving the verbal warning (on January 30) as Horton had stated, but going "to the next step which is more drastic," bypassing the normal procedure because of Horton's position as the Local's financial secretary-treasurer and chief steward. The next day he gave Personnel Director Young a letter (GC Exh. 23), stating in part: "I feel l am being discriminated against, as it appears that other employees are not reprimanded for . . . being a few minutes tardy."

On February 5, 1996, Young responded, sending Horned a letter (GC Exh. 22) that reveals the Company's determination to find some justification for giving the union official the written warning. Although the Company's practice both before and after this incident was to permit employees to eat their lunch on the Company's premises outside the plant in the picnic area without clocking out (Tr. 179–180, 213–216), Young asserted in the letter: "I would point out that your supervisor did not include that you left the premises during lunch, without clocking out and in on your timecard. *This may have resulted in your suspension* [emphasis added]."

I discredit Young's claim, when called as a defense witness, that "If people leave the building, they have always been required to clock out." Despite this claim, he admitted that "there's no specific work rule that says you have to clock out to eat in the picnic area," which is "company property," and "I believe our work rule says company premises." He then claimed, however, that "we have always practiced that if they leave the building they should clock in and clock out." (Tr. 516–517.)

Finally Young admitted, on further questioning by the union counsel (Tr. 517):

> Q. [By Mr. Riley] But would you agree that it is a common practice for employees to eat lunch in the picnic area without clocking out?
>
> A. I would agree that that occurs.

I find that the General Counsel has made a prima facie showing that the Company was unlawfully motivated and that it gave Secretary-Treasurer Horned the written warning because he was a union official in the plant, in its unlawful campaign to undercut support for the Union. *Wright Line,* 251 NLRB 1083 (1980).

The Company having failed to demonstrate that it would have taken the same action against Horned in the absence of his serving as a union official. I find that the Company unlawfully discriminated against him in violation of Section 8(a)(3) and (1).

Because the Company has not disputed the credited testimony that it had previously permitted Horned and other employees to make up the time at the end of the shift for being late, without any discipline, I deem it unnecessary to rule on the allegation that the Company unlawfully refused to furnish the Union with requested information that might establish disparate treatment.

b. Against President-Business Manager James Hulse

On June 17, 1996, about 2 weeks after master craftsman Hulse returned to work from the strike, the Company singled him out and gave him a written warning for continuing to keep a log of his jobs. He had been keeping such a log since 1992. It was common practice for employees to keep a record of their work, and employees have continued doing so after Hulse was given the warning. (Tr. 217, 236–237, 241–242, 252–253, 284–285, 380, 417, 428.)

Supervisor Chris McKenna had told Hulse on June 13 that he did not want Hulse to keep the log anymore, and Hulse had said okay. Hulse then realized that when the production part goes to another department, the paperwork goes with it and he has no record of the part number. He continued keeping the log, wanting to talk to McKenna again about it. (Tr. 242.)

On June 14, McKenna asked if Hulse was still keeping his record. Hulse said that yes he was, that he was not trying to be insubordinate, but "I wanted to talk more about it." He explained that after he told McKenna he would quit keeping the log, he realized that when he sent the paperwork off with the part, "I had no record of what part of that job that I worked on." He requested a meeting with Personnel Director Young, with Steward Horned present. (Tr. 243.)

Instead of the Company granting the request for such a meeting, Plant Superintendent McGuire personally intervened on June 14. As found, McGuire was responsible for already giving Horned a discriminatory written warning.

McGuire came to Hulse's job with McKenna and said, "Jim, Chris tells me that he asked you to stop keeping a log of your jobs and you are still doing it." Hulse said yes and explained why. McGuire said "You don't need to do that" because "Chris has all that in his computer." (Tr. 244.)

Hulse stated that "I'm a master level [craftsman]," and "If Chris doesn't trust me to get into his computer, how can I trust him to put the information in right about me?" Expressing his concern of being disciplined "for something that I didn't do," Hulse explained that previously he had been accused of "making mistakes on a couple of jobs that I didn't even work on and . . . I took Chris over to my clipboard and showed him the day that that job was done that I hadn't worked on it. And so, I didn't want to be disciplined for something I didn't do and I wanted a record of it. . . . I didn't have access to . . . his computer." (Tr. 244–245.)

McGuire responded that the Company is here to make money, and Hulse agreed. "I want the company to make money," but "This only takes 20, 25 seconds to write down" and other people have used his log. "It's actually making the company money. If it helps them run down a part, saves time." (Tr. 245.)

As Hulse credibly testified, McGuire "started the conversation again and I felt like he was leading up to disciplining me or tell me to quit, and that's when I butted in and told him . . . if you are going to say what I think you are getting ready to say . . . I want a job steward." McGuire responded that Hulse was a shop steward. Hulse said, "Well, I know I'm a shop steward, but I also want one," pointing out that "Gary Horned is a shop steward here." McGuire said, "I'll see if he's available." This was about 2:15 or 2:30 p.m., Friday, June 14. Quitting time was 3:30 p.m.

About 1:30 p.m. the following Monday, June 17, McKenna called Hulse to a meeting in McGuire's office, with Steward Gerald Clevenger present. There McGuire asked if Hulse was still "keeping a log after Chris asked you not to," said the Company was here to make money, and stated, "I'm going to write you up." (Tr. 246–247.)

Hulse stated that he was not trying to be insubordinate, that "I thought there was going to be another meeting because I'd asked for a job steward, and you said that [you] would see if Gary Horned was available. And so I thought there was going to be another meeting, so I continued that Monday . . . keeping a log . . . up until the time . . . of this meeting." (Tr. 247.)

Hulse protested that he had kept a log since 1992 and there had been no problem. He asked "why there is a problem now two weeks after I returned back from strike?" He told McGuire that McKenna had used his log (in checking the dispatch list) and also "other people in the office" (expeditors looking for a job or a part). He repeated: "Nothing was said then. Why is it a problem now?" (Tr. 240–241, 248.)

McGuire said he was still going to write Hulse up, even though "I told him that there was other people that I knew of that kept a log." McGuire asked for their names, but Hulse refused to supply them, explaining that his practice as a union steward was "never use anybody's name unless I clear it with them first."

It is not disputed, as Clevenger credibly testified, that Clevenger spoke up during the meeting and said he was not aware that keeping notes was wrong "because I keep notes, too." McGuire told him, "It may be necessary in your department but in Jim's department it is not." (Tr. 428, 432–433.)

The written warning given to Hulse on June 17, 1996, signed by McKenna and McGuire (GC Exh. 35), was for "Willful Insubordination," stating that "employee willfully disregarded instructions and continued to conduct personal business during work hours."

At the trial Hulse credibly named a number of employees who kept a log on the job. These included David Ball, who had told Hulse that he started keeping a log after the computer had him down as doing a job that he had never been on. (Tr. 252–253.)

On cross-examination, after Hulse repeated his estimate of "about 20, 25 seconds" to make each entry in his log, the company counsel asked him to demonstrate how long it would take to make the entry when moving from one job to another. He did so, and the parties stipulated that it took 18 seconds. (Tr. 260–267; R. Exh. 2.)

Hulse further credibly testified on cross-examination that since receiving the written warning, he has continued keeping the record at home, but without the part numbers, and has seen other employees keeping such detailed records. They have also "come up and told me that they have." (Tr. 268–269). Other employees credibly testified about the common practice of keeping a record of their work.

Fabricator Debra Behrens (hired May 5, 1995, GC Exh. 20) was told "I should write down everything that I work on." She believed "everybody keeps a record." (Tr. 284–285.) Craftsman Robert Wilson has been keeping a personal log for years. His supervisor was aware that he was doing so, because "there have been times" that the supervisor asked him when he had worked on a certain job, for welding certification purposes. He testified on cross-examination that "Yes," he has "been keeping a log" since he returned from the strike (Tr. 380). Craftsman David Cotter was aware that Gerald Clevenger and Don Warnecke still keep a log (Tr. 417).

Thus Plant Superintendent McGuire, who was already responsible for giving the Union's secretary-treasurer, Horned, a discriminatory written warning, gave the Union's president-business manager, Hulse, the written warning after he returned from the strike. McGuire singled out this second union official and disciplined him for continuing to follow the common practice of keeping a log of the jobs. Although it took Hulse only a fraction of a minute to keep a record of each of his jobs and although the Company had benefited by the record, McGuire repeatedly claimed that his purpose was to make money for the Company. He ignored Hulse's legitimate fear that he (like Horned) would be wrongfully disciplined.

I find that the General Counsel has made a prima facie showing that the Company was again unlawfully motivated and that it gave President Hulse the written warning because he was a union official in the plant, in its campaign to undercut support

for the Union. I also find that the Company has failed to demonstrate that it would have taken the same action against Hulse in the absence of his serving as a union official. I therefore find that the Company unlawfully discriminated against him in violation of Section 8(a)(3) and (1).

5. Delayed reinstatement of strikers

It is undisputed that on May 22, 1996, as President-Business Manager Hulse credibly testified, he and about 100 other strikers made an unconditional offer to return to work. International Organizer Krasovec, as their spokesman, told Plant Superintendent McGuire that as unfair labor practice strikers making their unconditional offer to return, they should be put back to work. McGuire said he would accept their offer to return, but that "they wouldn't take [them] right now." (Tr. 236–237.)

It is well established, as the Board held in *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), enfd. in relevant part 107 F.3d 882 (D.C. Cir. 1997):

> Because unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation of any denial of reinstatement, we shall order the [employers] to offer the strikers, on their unconditional applications to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike. The [employers] shall make the strikers whole for any loss of earnings and other benefits resulting from its failure to reinstate them within 5 days of their unconditional requests, with backpay and interest.

Having denied that the strike was an unfair labor practice strike, the Company reinstated only 15 of the strikers within the 5-day period by May 27, 1996. It belatedly reinstated 15 later in May, 56 in June, 9 in July, and 9 also in August (8 of the 9 during the week before the trial that began on August 19). (GC Exh. 20.)

In summary, the unfair labor practice began on July 25, 1995. As found, 149 strikers remained on strike on March 28, 1996, when the Company informed the employees that the strike was "effectively over." A total of 104 strikers made an unconditional offer to return to work on May 22, 1996. The Company reinstated 15 of the 104 strikers within 5 days. It belatedly reinstated the remaining 89 employees by the time of trial. There remained over 40 employees on strike (Tr. 151; GC Exh. 20).

6. Failure to return strikers to former positions

Gerald Clevenger. When the Company belatedly reinstated Steward Clevenger on June 3, 1996, it assigned him to train as a fabricator welder instead of returning him to his former job as electrician (Tr. 426).

Eugene Crain. On June 18, 1996, when the Company belatedly reinstated Eugene Crain, it refused to return him to his former job of sandblasting in department 960, stating that sandblasting was slow there. It assigned him to less desirable work, training and working as a floor grinder in department 945. His former sandblasting job was being performed by an employee whom he was training when he went on strike. (Tr. 419–422; GC Exh. 41.)

Timothy Daniels. Before the strike, fabricator Timothy Daniels was in charge of the plate heat exchangers assembly area, was doing all the shipping paperwork, and was "inspecting the units, just making sure that everything gets done right in the department." After belatedly reinstating him on June 3, 1996, the Company would no longer place him in charge of the assembly area, stating that "they didn't have to put us back" in the same job as long as they gave "our money back" and "put us back in the same classification." He had been replaced by an employee he had trained before going on strike. (Tr. 310–313, 316–320.)

Luong Nguyen. When craftsman Luong Nguyen, a certified ASME welder, was belatedly reinstated on June 17, 1996, the Company refused to return him to Bay One, forming tank heads. It assigned me to less desirable work in Bay Seven. (Tr. 435–439.)

Having caused the unfair labor practice strike, the Company was obligated to assign these returning strikers, after their May 22, 1996 unconditional offer to return, to the positions they held before going on strike in protest. Instead, the Company failed and refused to return them to their former jobs, which were being performed by nonstriking employees.

I find that the Company has failed and refused to return these unfair labor practice strikers, Steward Gerald Clevenger and employees Eugene Crain, Timothy Daniels, and Luong Nguyen, to their former positions in retaliation for their engaging in the strike. I therefore find that the Company unlawfully discriminated against them, violating Section 8(a)(3) and (1).

7. Assignments to onerous work

Daniel Gambriel. On June 17, 1996, the day before the Company belatedly reinstated master fabricator Daniel Gambriel, Supervisor Michael Cook told production worker Rusty Fender, a strike replacement, to work on a different job. Fender was then steaming plates, "getting all the glue and rubber off of them . . . about the worst job there is." It is undenied that Cook told Fender to do the different job so Cook "could leave the job to Danny" (Gambriel) who would be coming back on June 18. (Tr. 404–405.)

Although Gambriel had been the leadman in the department before going on strike, coordinating and inspecting the work, Cook assigned him when he arrived on June 18, 1996, to the onerous, "awful nasty," job steaming about 250 plates. On June 19 Steward Clevenger went with him to the office to complain "about me not being rightfully returned to my rightful position." Cook told him that "as far as they were concerned, the case was closed." For 2 weeks he was assigned to this and other onerous work. (Tr. 314–315, 405–413, 415, 430.)

Mackey Boles, Jerry Marshall, and *Robert Wilson*. On June 12 and 13, 1996, after craftsman Mackey Boles, fabricator Jerry Marshall, and craftsman Robert Williams were reinstated, the Company took them from their jobs in the plant. While nonstriking junior and replacement employees were performing their jobs, they were assigned to work those 2 days in the yard in the hot sun, doing the onerous work of cleaning up trash and

picking up, cutting, and loading scrap metal in the dumpster. (Tr. 376, 378–379, 381–391, 393.)

The Company was obviously giving preference in assigning work to the nonstriking junior and replacement employees. I find that the General Counsel has made a prima facie showing that the Company assigned the onerous work to the returning unfair labor practice strikers in retaliation for their engaging in the strike. The Company has failed to demonstrate that it otherwise would have taken the same action against them.

I therefore find that the Company discriminatorily issued the onerous work assignments to Mackey Boles, Daniel Gambriel, Jerry Marshall, and Robert Wilson for engaging in the strike, violating Section 8(a)(3) and (1).

8. Other alleged violations

a. Absenteeism

The amended complaint (GC Exh. 39) alleges that about October 18, 1995, the Company unlawfully issued a verbal warning to Debra Behrens (a member of the union negotiating committee) for engaging in activities on behalf of the Union.

The Company asserts that Behrens was absent 11 days in the 14-day period, October 4 to 17. The General Counsel offered testimony that because she was working on the third shift, she would be absent both the night before and after she attended a daytime meeting, but failed to account for other absences. (Tr. 286, 301.)

I find that the General Counsel has failed to prove that she was being discriminated against. I therefore find that the allegation must be dismissed.

b. Parking restriction

The complaint alleges that on October 30, 1995, the Company unlawfully prohibited striking employees from parking in the employee parking lot. The Company then reserved the parking lot for "actively working employees and official company business" (Tr. 50–51, 114–115, 327, 396–397; GC Exh. 19.)

Neither the General Counsel nor the Union has cited any precedent for finding a violation of the Act for prohibiting strikers from trespassing on company property to park their cars during a strike. I find that the allegation must be dismissed.

c. Picket shelter

About November 22, 1995, the Union erected a wooden picket shelter (about 4 feet wide, 10 feet long, and 8 feet high) without permission on the Company's premises across the street from the plant and refused to remove it. The Company made various efforts to have the shelter removed and on December 28, 1995, did remove and store it in its warehouse until the Company returned it to the Union. Upon recovering the shelter, the Union placed it back on the Company's premises near where it had been. (Tr. 95–113, 134–148, 156–157, 218–236, 323, 441–443; GC Exhs. 26–27, 34, 38, 42–43; R. Exhs. 1–2.)

On January 4, 1996, the Company issued written warnings to 12 strikers for failing to carry out its instructions to vacate the shelter and also brought trespass charges against them for police summons. In deference to the Board's alleged jurisdiction over the matter, the trespass charges were dismissed. (Tr. 61, 158–163, 167–168, 172–175, 281–283, 311, 322–325; GC Exhs. 21, 29–30.)

Again, neither the General Counsel nor the Union has cited any precedent for finding a violation of the Act for prohibiting such a trespass on the Company's property. I find that the 12 striking employees were engaged in unprotected activity and that the Company's issuing the written warnings and bringing the trespass charges against them for engaging in this unauthorized trespass on its property did not violate the employees' right to engage in protected concerted activities.

I therefore find that the allegations that the Company unlawfully removed the picket shelter, ordered the striking employees to vacate the shelter, and took the disciplinary action against the 12 striking employees must be dismissed.

d. Threat of closer supervision

On May 31, 1996, after President-Business Manager Hulse was belatedly reinstated, he was called to Plant Superintendent McGuire's office. There McGuire stated that Hulse's department had an efficiency rating of 120 percent and that if it did not stay that way, he would be looking around to see "if the returning strikers [were not] pulling a slowdown or goldbricking." (Tr. 238.)

That same day, when striker Roger Humphrey was also reinstated, McGuire told him that his department had an efficiency rating of 117 percent , that "they didn't want me to come back in there and disrupt the department . . . to keep up the work and not pull a slowdown." After the meeting, Supervisor McKenna said they were "going to keep an eye on me and make sure [that] I didn't slow down and disrupt the department." (Tr. 165.)

The General Counsel contends in its brief (at 38) that McGuire "was threatening these employees with closer supervision because of the union activities." I disagree.

McGuire's statements were made in the context of the return of most of the strikers, yet the strike was continuing. Under these circumstances I deem his statements to be a reasonable, understandable precaution against the returning strikers disrupting production in support of the remaining strikers.

I therefore find that the allegation that McGuire threatened "its employees with closer supervision because of their union activities and support" must be dismissed.

CONCLUSIONS OF LAW

1. By unilaterally transferring bargaining unit work, the assembly of wine tanks, from its Springfield plant to its nonunion plant in Osceola, Iowa without notice to or bargaining with the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unilaterally paying new production workers a start rate of $7.85 an hour, which was never offered the Union in negotiations, the Company violated Section 8(a)(5) and (1).

3. By unilaterally instituting in its health insurance plan the Med-Pay Plus and PBA delivery system, which was not reasonably comprehended in its implemented pre-impasse proposal to the Union, the Company violated Section 8(a)(5) and (1).

4. By unilaterally changing the pre-impasse proposal to limit the increased benefits to retirement plan participants on the current payroll, the Company violated Section 8(a)(5) and (1).

5. The strike that began on July 25, 1995, was an unfair labor practice strike.

6. By unilaterally announcing and implementing its decision—without bargaining to impasse—to make changes in the health insurance plan and retirement plan on April 1, 1996, to grant wage increases on March 25, 1996, and to make the wage increases retroactive to September 19, 1995, the Company violated Section 8(a)(5) and (1).

7. By threatening an unfair labor practice striker with permanent replacement if he did not abandon the strike, by indicating to him that it would be futile for him to continue supporting the Union, and by promising a promotion to encourage an employee to abandon the strike, the Company engaged in coercive conduct in violation of Section 8(a)(1).

8. By discriminatorily giving President-Business Manager James Hulse and Secretary-Treasurer Gary Horned written warnings because they were union officials in the plant, in its campaign to undercut support for the Union, the Company violated Section 8(a)(3) and (1).

9. The Company failed to reinstate, within 5 days, 89 of the 104 unfair labor practice strikers who made an unconditional offer to return to work on May 22, 1996.

10. By discriminatorily failing and refusing to return the unfair labor practice strikers, Steward Gerald Clevenger and employees Eugene Crain, Timothy Daniels, and Luong Nguyen, to their former positions, the Company has violated Section 8(a)(3) and (1).

11. By discriminatorily issuing onerous work assignments to strikers Mackey Boles, Daniel Gambriel, Jerry Marshall, and Robert Wilson after reinstating them, in retaliation for their engaging in the strike, the Company violated Section 8(a)(3) and (1).

12. The undisputed appropriate bargaining unit is

> All full-time and regular part-time craftsmen, fabricators, and production workers employed by Paul Mueller Company at its Springfield, Missouri facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas, and other machinist work areas.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully transferred the assembly of wine tanks to its nonunion plant in Iowa without notice to or bargaining with the Union, the Company must restore this bargaining unit work to unit employees in the Springfield plant and make bargaining unit employees whole for any lost earnings resulting from the transfer, plus interest.

As found, because the Company's $6.50 start wage rate in its implemented pre-impasse proposal was too low to attract and keep production workers after the impasse and before the July 25, 1995 strike, the Company unilaterally raised the start rate $1.35 to $7.85 an hour, which it began on May 1, 1995, paying some new production workers without notice to or bargaining with the Union. It never offered the wage increase in negotiations with the Union.

After the Union went on strike, which was caused in part by this unlawful refusal to bargain, the Company did nothing to remedy the violation of Section 8(a)(5) and (1). To the contrary, it offered the Union a contract that would freeze the production-worker start rate, for a period of 5 years, *below* $7.85. At the same time, the Company was continuing to favor not only these new employees, but also other production workers, fabricators, and craftsmen hired after the impasse and before the strike—paying them wages as high as $2.70 above the rates it had offered the Union.

Effective March 25, 1996, without bargaining to impasse on wages, the Company implemented the 5-year freeze on the production-worker start rate below $7.85.

Under these circumstances, and in view of the Company's continuing to determine unilaterally the employees' wages and working conditions as if the Union no longer existed in the plant, I find that as a necessary remedy for its refusal to bargain, the Company must raise the start wage rate for all production workers to $7.35 an hour, retroactive to May 1, 1995, and grant the production workers backpay, with interest.

Having implemented other changes in wage rates effective March 25, 1996 without bargaining to impasse on them and having otherwise refused to bargain while acting "as though the Union did not exist," the Company must on request by the Union bargain in good faith on wages and other conditions of employment.

As a necessary remedy for its unilaterally instituting the Med-Pay Plus and PBA delivery system in its health insurance plan, the Company upon request by the Union must restore the previous health care delivery system and make whole unit employees for any incurred expenses caused by these unlawful changes in the plan, with interest.

To remedy its unlawful amendment to the retirement plan, limiting the increased benefits to retirement plan participants on the current payroll, the Company must rescind this amendment and make whole any plan participant adversely affected, with interest.

For the unfair labor practice strikers who remained on strike after May 22, 1996, the Company must offer them, on their unconditional requests to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike on July 25, 1995.

The Company must make these strikers whole for any loss of earnings and other benefits resulting from its failure to reinstate them within 5 days of their unconditional requests, with backpay and interest computed in the manner prescribed in *F. W.*

Woolworth Co., 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having failed to reinstate, within 5 days, 89 unfair labor practice strikers who made their unconditional offer to return to work on May 22, 1996, the Company must make them whole for any loss of earnings and other benefits resulting from its failure, with backpay and interest.

Having failed and refused to return four of the strikers to their former positions after belatedly reinstating them, the Company must promptly do so upon request.

[Recommended Order omitted from publication.]